No. 89-563

In the Supreme Court of the United States

OCTOBER TERM, 1989

VIEUX CARRE PROPERTY OWNERS, RESIDENTS & ASSOCIATES, INC., PETITIONER

v.

COLONEL LLOYD KENT BROWN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether federal undertakings subject to the historical comment requirement of the National Historic Preservation Act, 16 U.S.C. 470f, include "truly inconsequential activities" authorized by a nationwide permit promulgated by the Army Corps of Engineers.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-27a, is reported at 875 F.2d 453. The order and reasons of the district court, Pet. App. 30a-36a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1989. A petition for rehearing was denied on July 12, 1989. Pet. App. 28a-29a. The petition for writ of certiorari was filed on October 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an organization whose members own land within the Vieux Carre National Historic Landmark

District (the French Quarter) in New Orleans, Louisiana. Petitioner filed this lawsuit to prevent respondent Audubon Park Commission from building an aquarium and riverfront park at the foot of Bienville Street in that district. Pet. App. 1a-2a.

Before construction began, the Audubon Park Commission submitted its plans to the Army Corps of Engineers for the Corps's determination whether a permit is required under the Rivers and Harbors Act, 33 U.S.C. 403.[1] The Corps determined that construction of the aquarium does not require a permit because that structure would be located landward of the ordinary high water line and is therefore outside the Corps's jurisdiction. The Corps found that the riverfront park, although riverward of the ordinary high water line and therefore within the Corps's jurisdiction, is authorized by a nationwide Corps permit so that it, too, does not require an individual permit.[2] Pet. App. 3a-4a.

[1] Section 403 of the Rivers and Harbors Act prohibits the "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." That Section also prohibits construction and certain other activities in the waters of the United States unless those activities are pursuant to plans recommended by the Army Corps of Engineers and authorized by the Secretary of the Army.

[2] A nationwide permit is a regulation that authorizes activities subject to the jurisdiction of the Corps of Engineers. If the proposed project meets the criteria of a nationwide permit, it may be undertaken without individual approval by the Corps. See 33 C.F.R. 330.1.

The Corps's regulations include several nationwide permits for enumerated categories of activities. Among the categories of activities for which a nationwide permit has been promulgated is:

> (3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure

2. The district court dismissed petitioner's action in its entirety. It held that petitioner did not have a private right of action against any of the non-federal respondents and that petitioner could not obtain judicial review of the Corps's determinations because they were "committed to agency discretion by law." Pet. App. 33a-36a.

3. The court of appeals affirmed that part of the district court's judgment dismissing petitioner's claims against the non-federal respondents, but it reversed the district court's judgment insofar as it held that the Corps's determinations were not subject to judicial review. Pet. App. 5a-9a & n.1. The court of appeals then reviewed the Corps's determinations that the aquarium and riverfront park projects do not require permits and do not trigger the historical comment requirement of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f.[3]

> or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted. * * *

33 C.F.R. 330.5(a). The Corps determined that construction of the riverfront park in this case is authorized by the nationwide permit quoted above because the placement of sod, trees, and benches would involve only minimal structural rehabilitation and would not interfere with any current use of the wharf. Pet. App. 4a.

[3] Section 470f of the National Historic Preservation Act requires an agency that has "authority to license" an "undertaking" to "afford the Advisory Council on Historic Preservation * * * a reasonable opportunity to comment with regard to such undertaking." That Section provides in full as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the under-

With respect to the aquarium, the court of appeals held that no permit is required and that no historical comment is necessary. The Corps determined that construction of the aquarium would not constitute an obstruction or otherwise affect navigable capacity within the meaning of the Rivers and Harbors Act, 33 U.S.C. 403 (see note 1, *supra*), and the court of appeals concluded that the Corps's jurisdictional determination was not arbitrary or capricious. Pet. App. 17a-21a.

With respect to the riverfront park, however, the court of appeals remanded to the district court. Pet. App. 27a. The court of appeals held that "nationwide permits authorizing truly inconsequential activities are not triggering 'licenses' under section 470f." Pet. App. 25a. But because the district court had not determined whether the park project is authorized by the nationwide permit, 33 C.F.R. 330.5, the court of appeals remanded for that determination. The remand instructions further provide that even if the district court determines that the park is covered by the nationwide permit, it must still determine whether the park project is sufficiently "inconsequential" that it is not subject to the historical comment provision of the NHPA. Pet. App. 26a. Finally, the remand instructions require the district court to address petitioner's argument that the Corps neglected to evaluate the park's impact on historic properties as required by its own regulation, 33 C.F.R. 330.5(b)(9). Pet. App. 26a.

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taking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. 470f.

ARGUMENT

Petitioner renews its contention that the proposal to build a riverfront park should have been submitted for comment as to its impact on the preservation of historical properties under Section 470f of the NHPA.[4]

1. This case no longer presents a live case or controversy. Petitioner claimed that Section 470f of the NHPA required the Army Corps of Engineers to provide the Advisory Council on Historic Preservation a "reasonable opportunity to comment" on the effect of the riverfront park on the historic district. 16 U.S.C. 470f. See 16 U.S.C. 470h-2(f). Petitioner alleged no property or other substantive right to prevent construction of the park on the Bienville Street Wharf. Nor does it claim in this Court any civil damages remedy for construction completed in violation of the historical comment requirement. Because the remedy for petitioner's claim is a declaration that the Corps must submit the park project for historic comment, the completion of that project while this case was on appeal means that declaratory relief can no longer be provided and makes this case moot. See Audubon Park Commission and the City of New Orleans Br. in Opp. 15.

2. Even if this case were not moot, the absence of a final judgment would make review by this Court premature. This Court does not review interlocutory decisions "except in extraordinary cases." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *American Construction Co.* v. *Jacksonville, T.&K.W.R.R.*, 148 U.S. 372, 384 (1893). Accordingly, this Court has generally confined interlocutory review to cases involving important and clearly defined issues

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[4] Petitioner no longer claims that plans to construct the aquarium should have been submitted for historical comment.

fundamental to the subsequent conduct of the case, see, *e.g.*, *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964), or a determination of rights separate from and collateral to rights asserted in the action, see, *e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170-172 (1974); *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949).

The review petitioner seeks does not qualify under either of those exceptions. Resolution of the question whether all possible activities – even "truly inconsequential" ones – are subject to the NHPA is not necessary for the district court to follow its remand instructions. Furthermore, the NHPA claim petitioner presses in this Court is not collateral to the NHPA claim it retains in the district court on remand; both claim that the Corps should have submitted the park project for comment on its effect on the preservation of historic properties.

Review at this stage of the proceedings would be particularly premature because the court of appeals did not specifically identify those "truly inconsequential activities" that are not subject to the NHPA. Were the case not moot, the scope of this phrase and its application here would be determined in the first instance by the district court on remand. Thus, under the remand order in this case, it is possible that petitioner would have prevailed with respect to the park project at issue. In any event, this Court's review would have been more appropriate after further consideration and definition of the court of appeals' legal standard and application of that standard to the facts of this case.

3. Moreover, the court of appeals' decision is correct and does not conflict with the decision of any other court. Because the court of appeals has not yet determined whether the park project challenged in this case is "truly inconsequential" and therefore not subject to the NHPA, petitioner's claim at this juncture is necessarily that every

activity subject to the Corps's jurisdiction under the Rivers and Harbors Act – no matter how trivial – must be reviewed for its historical impact under the NHPA.

Section 470f of the NHPA, however, does not rescind the doctrine *de minimis non curat lex* – the law does not concern itself with trifles. To the contrary, that Section requires an opportunity for historical comment only with respect to a federal "undertaking," and the legislative history of that undefined term suggests that "the degree of Federal involvement in an undertaking and the relation of that involvement to the effects on an historic property should both be considered" in determining what actions comply with the NHPA, H.R. Rep. No. 1457, 96th Cong., 2d Sess. 45 (1980). Under petitioner's construction of the NHPA, every activity subject to the Corps's jurisdiction under the Rivers and Harbors Act would have to be submitted for historical comment regardless of that activity's potential effect on the preservation of historic properties. Petitioner's construction would flood the Advisory Council on Historic Preservation with trivial requests for comment that would inevitably dilute the effectiveness of the Council's review. Section 470f does not require, and should not be construed to require, that counterproductive result. Cf. *Public Citizen* v. *U.S. Dep't of Justice*, 109 S. Ct. 2558 (1989) (interpreting similarly undefined statutory term "utilized").

The courts of appeals are not divided on the meaning of Section 470f of the NHPA. Indeed, none appears to have articulated a legal standard for applying Section 470f. In *Ringsred* v. *City of Duluth, A Minnesota Home-Rule Charter City*, 828 F.2d 1305 (1987), the Eighth Circuit noted only that "*[t]he parties* treat NHPA's 'undertaking' requirement as essentially coterminous with NEPA's 'major Federal actions' requirement." *Id.* at 1309 (emphasis added). Without offering its own definition of that term, the Eighth Circuit held that a parking ramp project that was "not subject to

any federal licensing" fell outside the scope of the NHPA. 828 F.2d 1308-1309. The Tenth Circuit's decision in *Riverside Irrigation District* v. *Andrews*, 758 F.2d 508 (1985), is even further afield. In that case, the Tenth Circuit refused to cross-apply National Environmental Policy Act cases (that Act authorizes government action only when there is a "major Federal action[ ]," 42 U.S.C. 4332(C)), to the case before it involving the Endangered Species Act (ESA) (which requires consultation "on any prospective agency action," 16 U.S.C. 1536(a)(3)). 758 F.2d at 513. *Riverside* did not construe the NHPA; the operative language of the ESA and the NHPA differ materially (the former applies to "action[s]" while the latter applies to "undertaking[s]"); and even with respect to the ESA the Tenth Circuit did not apply it to "truly inconsequential" actions because that question was not before it. No conflict divides the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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